

IN THE MATTER OF LICENSE NO. 225969 MERCHANT MARINER'S DOCUMENT NO.
Z-159607-D3 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: John H. JEWELL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1813

John H. JEWELL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 22 November 1967, an Examiner of the United States Coast Guard at Baltimore, Maryland, revoked Appellant's license upon finding him guilty of misconduct. The specifications found proved allege that while serving as chief mate on board SS FAIRISLE under authority of the document and license above described, on or about 16 October 1967, Appellant, while the vessel was at Qui Nhon, R.V.N.:

- (1) failed to perform duties in connection with preparing the vessel for sea, by reason of intoxication;
- (2) showed insubordination to the master by the use of vulgar, abusive, and threatening language; and
- (3) refused to obey an order of the master to stay off the deck and remain in his quarters.

Appellant did not appear for the hearing. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of FAIRISLE and the testimony of the master.

There was no evidence for Appellant

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking Appellant's license.

The entire decision was served on 10 October 1968. Appeal was timely filed by counsel on 24 October 1968. Normally, the appeal should have been perfected by 24 March 1969. Four extensions were

granted at Appellant's request, allowing until 7 November 1969 for completion of the appeal. On 8 September 1969 Appellant's counsel withdrew from the case and a new counsel was substituted. The new counsel submitted a statement of grounds for appeal, together with a petition to reopen the hearing, on 29 October 1969.

FINDINGS OF FACT

On 16 October 1967, Appellant was serving as chief mate on board SS FAIRISLE and acting under authority of his license and document while the ship was in the port of Qui Nhon, R.V.N.

On that date, Appellant failed to perform his duties in connection with readying the ship for sea because of intoxication, used insubordinate language to the master of the vessel, and failed to obey an order of the master to stay off the deck and to remain in his room.

BASES OF APPEAL

Appellant's petition to reopen is based upon an alleged misleading of him by the master to the effect that the charges were to be dropped. Appellant should therefor be permitted to cross-examine the master and testify in his own behalf.

Appellant also states:

" . . . we would be perfectly content to have the Commandant reopen the hearing only to the extent of considering the attached Affidavit as part of the record on appeal."

Assuming that the testimony in the Affidavit is to be considered, Appellant, as a basis for appeal, argues that his version of events is true and the master's is not.

A further ground for appeal is that his misconduct occurred on only one day in the whole voyage.

Finally, Appellant urges that the order of revocation is too severe.

APPEARANCE: Royston, Rayzor & Cook, Galveston, Texas, by Edward J. Paterson, Esquire.

OPINION

I

Appellant's petition to reopen the hearing is denied for

several reasons.

The first, and ultimately the controlling one, is that newly discovered evidence is not offered. 46 CFR 137.25-1. What Appellant wishes is to testify himself and to cross-examine the master, which he could have done had he appeared for the hearing. It is noted that Appellant urges that could he cross-examine the master he would be able to establish that on all dates other than the one in question he had performed satisfactorily, despite some general statements in the master's testimony about overall performance.

In restating Appellant's grounds for appeal I have been willing to accept this anyway. Appellant was charged with misconduct on one date and one date only and that is all that is considered here. Nevertheless, no question of newly discovered evidence is raised.

Appellant's argument that he was misled by the master into thinking that the matter would be dropped, and thus failed to appear for the hearing, has no merit whatsoever. The record shows clearly that on two occasions on 17 November 1967 a Coast Guard investigating officer notified Appellant of the charges and advised him of his rights respect to the scheduled hearing. Appellant refused to accept the papers on which the charges were written. No matter what the master might have said earlier to Appellant, Appellant was on notice that a Coast Guard investigating officer had in fact preferred charges against him. His intransigent attitude then cannot be corrected by a plea, two years later and inherently incredible, that he was misled as to anything.

A third consideration in connection with Appellant's petition is the lapse of time involved. It is true that 46 CFR 137.25-1 permits a petition to reopen at any time prior to a final decision on appeal, and that such a decision had not been issued when the petition was filed. I note that almost a year elapsed before service of the Examiner's decision could be effected upon Appellant. I must note also that on appeal Appellant was represented by professional counsel who sought, and received, four delays in my consideration of this appeal. This allowed more than a year after service of the initial decision for Appellant to develop ground for a petition to reopen the hearing. Under such circumstances, a petition urging newly discovered evidence would necessarily be subject to intense scrutiny. Scrutiny is not needed in this case because, as I have said, there is no attempt to proffer newly discovered evidence.

II

It follows from this that I do not reopen the hearing even to the extent "of considering the . . . Affidavit as part of the record on appeal." While it is true that on appeal I may proceed as if I had been the initial trier of facts (5 U.S.C. 557), I will not dignify the rejected affidavit by stating that it would persuade one to make findings different from those made by the Examiner.

III

The findings of the examiner, based upon the testimony of the master of FAIRISLE and voyage records made in accordance with law, are based upon substantial evidence and are not to be disturbed.

IV

The only serious question here is the propriety of the Examiner's order which has been asserted to be excessive.

When I look to the Examiner's order, the first thing that I note is that it does not affect Appellant's merchant mariner's document. The order, after finding "misconduct" proved, should have been directed "against all license, certificates, and/or documents" of Appellant. When an Examiner's order is not in accordance with regulations the case can be remanded to the Examiner for entry of a proper order. Decision on Review No. 5. In view of the disposition I am making of the case, and the time which has elapsed since the decision I am not inclined to remand the case for remedial action.

Next, it is perceived that the Examiner's order, as stated in his opinion, was considered appropriate because of Appellant's prior record. Since 1958 Appellant has had only one "misconduct" encountered with R.S. 4450. In 1966 he was warned at Honolulu for wrongful possession of alcoholic beverages aboard SS SEASCOPE.

I am aware that the charges in the instant case involve intoxication while on duty and that the evidence implies also a wrongful possession of intoxicants aboard the ship. I do not think, however, that one bad day aboard FAIRISLE warrants affirmation at this time of an order of revocation. I note that Appellant retained possession of his license for a full year after entry of the Examiner's decision and before it was served on him. Moreover, he has remained in possession of his document for more than a year since he surrendered his license. Presumably he has sailed in that time but no new allegation of misconduct by the Appellant has been brought to my attention.

CONCLUSION

I conclude therefore that an order of suspension for one year would be appropriate in this case. Since the delays here have been attributable to Appellant himself I find no reason to give credit for time spent, especially since Appellant has retained possession of his merchant mariner's document throughout the interval.

ORDER

The order of the Examiner dated at Baltimore, Maryland, on 22 November 1967, MODIFIED to provide that Appellant's license No. 225969 is suspended for one year from this date, and as MODIFIED is AFFIRMED.

C. R. BENDER
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 19th day of August 1970.

INDEX

Hearings

- Reopening of, newly discovered evidence
- Reopening of, grounds for not present
- Absence from, refusal to appear
- Advice on service of charges
- Excuse for absence unadequate
- Notice, actual

Charges and Specifications

- Refusal of

Affidavits

- Submitted on appeal

Appeal

- Evidence, right to weigh
- Modification of Examiner's order

Findings of fact

- Based on substantial evidence

Modification of Examiner's order

- As excessive
- On appeal
- Commandant's direction

Order of Examiner

- Inappropriate